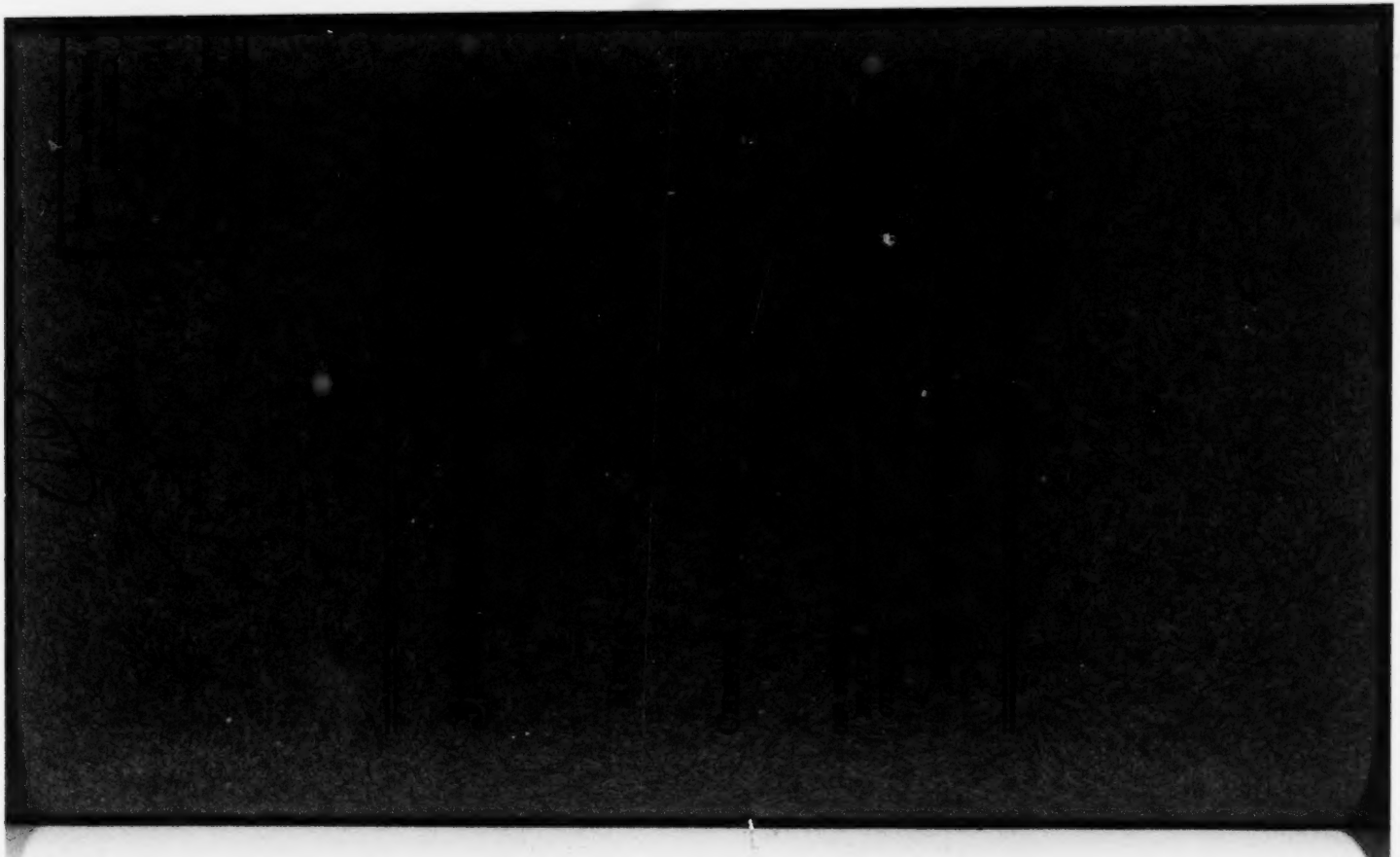

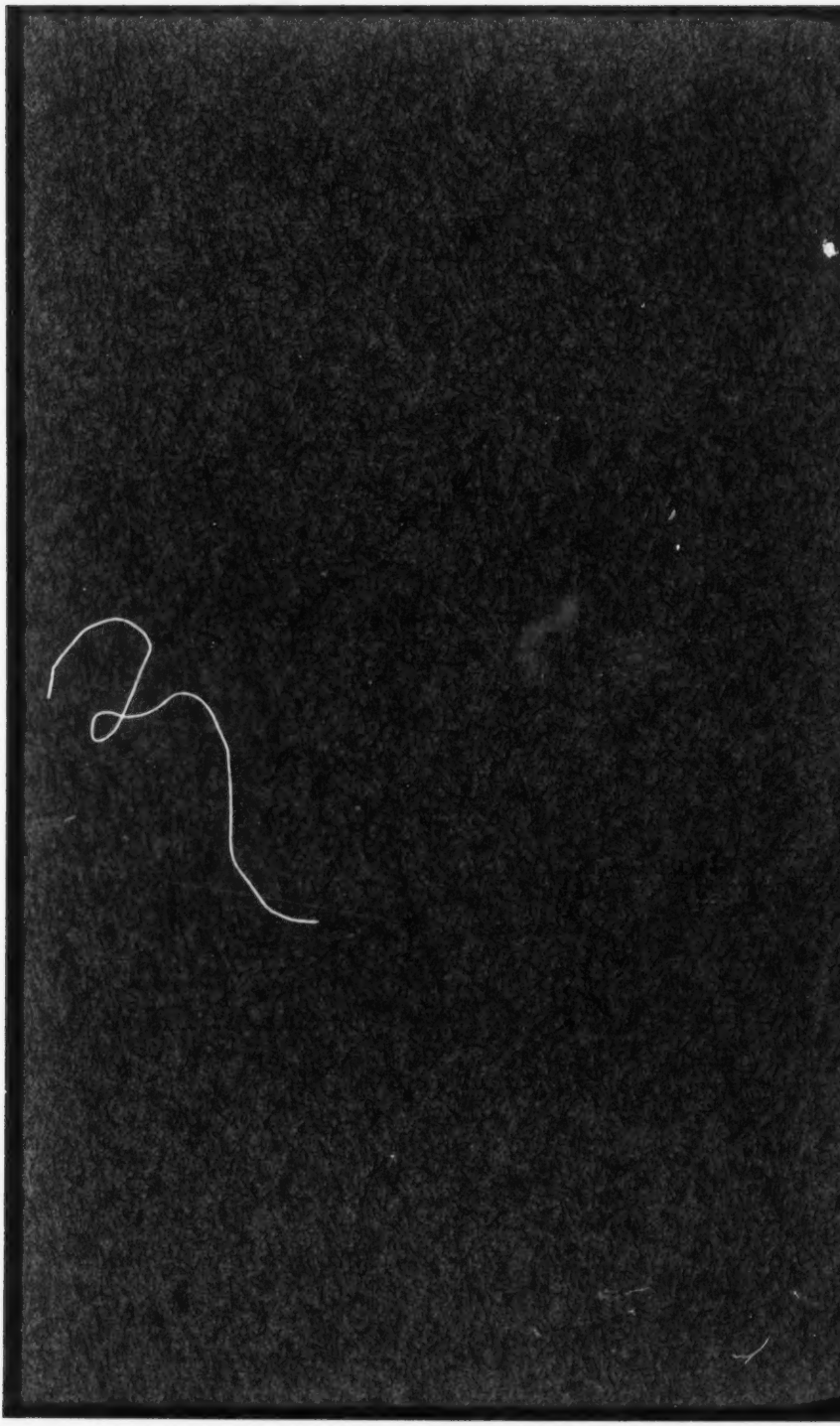

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CITATIONS

621160—44

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 687

NUWAY LAUNDRY COMPANY, A CORPORATION,
PETITIONER

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District is reported in 52 F. Supp. 498. The opinion of the Circuit Court of Appeals for the Tenth Circuit is reported in 144 F. 2d 741.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 28, 1944 (R. 88). A petition for rehearing was denied on October 7, 1944 (R. 102). The petition for a writ of certiorari was filed in this Court on November 16, 1944.

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (28 U. S. Code 347 (a)).

STATUTE AND REGULATIONS INVOLVED

The case involves the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. Code App. Supp. III, 901 et seq.) as amended by the Stabilization Act of 1942 (56 Stat. 765, 50 U. S. Code App. Supp. III, 961) and Maximum Price Regulation No. 165 (7 F. R. 4734 and 9 F. R. 7439). The pertinent provisions of the Act and of the Regulation are set forth in the Appendix, *infra*, pp. 10–12.

STATEMENT

Maximum Price Regulation No. 165, *infra*, p. 11, provides that no person shall sell a laundry service at a price higher than that which he charged for the same or similar service to "a purchaser of the same class" during the month of March 1942, and expressly prohibits the evasion of any of its provisions by changing customary allowances, discounts or other price differentials (Sec. 1499.101–102).

Petitioner, the operator of a laundry in Oklahoma City, in March 1942 sold five types of laundry services, designated as bundle services. (R. 24–25, 41.) It has discontinued the sale of all but two of these services, namely, an "all finished bundle service" and a "fluff dry bundle service". (R. 25, 42–43.) The "all finished" service con-

sists of laundering and returning completely finished and ready for use all of the articles in the bundle delivered by the customer. (R. 42.) The "fluff dry" service consisted of laundering the articles in the bundle delivered by the customer, and returning them washed and dried but not pressed or otherwise finished, except that shirts included in the bundle were completely finished in the same manner as shirts included in an "all finished" bundle. (R. 41, 42.) For shirts in a "fluff dry" bundle, petitioner in March 1942 charged 8 cents a shirt. (R. 41.) In March 1943 it increased this price to 12½ cents a shirt. (R. 42.) Since July 1943 it has purportedly discontinued laundering shirts as a part of its so-called "fluff dry" bundle service and since then has charged for laundering shirts, whether tendered with articles to be laundered "fluff dry" or otherwise, the price which it charged for laundering shirts in an "all finished" bundle, that is, from 15 to 25 cents for each plain shirt. (R. 43.)

Petitioner also sells two other services, designated respectively as a linen rental service, and commercial flatwork. For competitive reasons it followed a practice of charging different customers different prices for these services. Between November 1942 and March 1943 it increased the prices for each of these services to some of its customers and has since charged them higher prices than it charged them in March 1942 for the same services. (R. 40–41.)

In November 1942 petitioner discontinued a discount of 20% which in March 1942 and for several months prior thereto it had extended to its cash and carry customers. (R. 43.)

Alleging that by the discontinuance of the 20% discount and in effecting the several price increases above recited petitioner had violated the regulation, the Administrator brought this suit for an injunction to restrain petitioner from continuing to violate the Act and the Regulation. (R. 1–5.) The district court denied an injunction and dismissed the action. (R. 30–39, 44.) The circuit court of appeals reversed the judgment of dismissal and held that the discontinuance of the discount and the introduction of the several price increases constituted clear violations of the regulation. It directed the district court to issue an injunction restraining the petitioner from continuing the acts and practices which it found to be in violation of the regulation. (R. 77–88.)

QUESTIONS PRESENTED

1. Whether petitioner violated the applicable maximum price regulation—

(a) in increasing its prices to some of its customers for its linen rental and commercial flat work services over the prices which it charged the same customers in March 1942;

(b) in charging for laundering shirts tendered with laundry to be finished "fluff dry" more than it charged for laundering shirts so tendered in March 1942;

(c) in discontinuing a 20% discount which it had extended to its cash and carry customers in March 1942.

2. Whether the circuit court of appeals rightly directed the issuance of an injunction restraining petitioner from violating the regulation.

ARGUMENT

The decision of the court below is clearly right and not in conflict with that of any other circuit court of appeals, and no substantial reason exists for granting a writ of certiorari.

1. Contrary to petitioner's contention, the circuit court of appeals was right in holding that petitioner violated the regulation in increasing the price of its commercial flatwork linen rental services to some of its customers over the price which it charged them in March 1942. Petitioner in March 1942, for competitive reasons, followed an established practice of charging certain of its customers less than it charged its other customers. The regulation has at all times limited the price which any seller may charge for any service to the highest price charged by the seller for the same service during March 1942, "to a purchaser of the same class", and, until revised in July 1944, defined the term "purchaser of the same class" as referring to "the practice adopted by the seller in setting different prices for consumer services for sales to different purchasers or kinds of purchasers . . ." Section 1499.116(10). Constru-

ing these provisions, the Administrator on August 20, 1942, and September 22, 1942, respectively, issued the following official interpretations (OPA Service 11:968–969):

> Frequently, of course, a seller may have had the practice of giving a customer special low prices with the complete absence of any criteria which can be objectively applied. Thus a seller may have customarily given one customer—who by all objective tests was like many other customers—a special low price out of friendship, or habit, or whim, or because the particular customer was exceptionally good at haggling. In such a case, this buyer is in a saparate class by himself; his class was established by the seller's practice of giving him a lower price. OPA Service 11:968.)
>
> * * * Thus if a laundry customarily charged two customers different prices at the same time the two customers are in separate classes even if one customer sometimes paid more than the other and sometimes less. (OPA 11:969.)

Under this interpretation, petitioner plainly violated the regulation, and we do not understand petitioner to contend otherwise. Whether the interpretation is proper and whether the court below erred in following it are questions which are no longer of importance, because when the regulation was revised in July 1944 (9 F. R. 7439) the interpretation was embodied in the regulation

itself. The definition of the term "purchaser of the same class" now reads:

> "Purchaser of the same class" means a purchaser belonging to the same price class, that is, to a group of purchasers to whom it was your established practice in March 1942 to supply or offer to supply the same service at a particular price. If in March 1942 you customarily supplied or offered to supply the same service to any purchaser at a price different from the price at which you supplied or offered to supply the same service to all other purchasers, that purchaser is in a price class by himself.

Since this is a suit for an injunction which operates wholly *in futuro*, applicable to a continuing course of action, the revised regulation controls its disposition. *Texas Company* v. *Brown*, 258 U. S. 466; *Standard Oil Company* v. *Angle*, 128 F. 2d 728 (C. C. A. 5th). Under the regulation as revised, the decision of the circuit court of appeals is not open to question.

2. There is no merit in petitioner's contention that the court erred in holding that petitioner's alleged discontinuance of the laundering of shirts as a part of the "fluff dry" bundle service constituted a violation of the regulation. Petitioner is still, as in March 1942, laundering shirts and is still accepting laundry, without shirts, to be finished "fluff dry". During March 1942, as at present, shirts were processed separately from the

laundry to be finished "fluff dry". In fact, petitioner's general manager testified that all shirts were run through the same shirt line (R. 52). But in March 1942 petitioner charged only 8 cents to launder a shirt if tendered with laundry to be finished "fluff dry", whereas today it is charging more than twice that amount for a shirt similarly tendered. Petitioner's statement that it has discontinued laundering shirts as a part of its "fluff dry" bundle service and is laundering shirts only as a part of its "all finished" bundle is, therefore, merely another way of saying that it has increased its price for laundering shirts tendered with other laundry to be finished "fluff dry". Price increases are forbidden by the regulation, whatever may be the formula used to describe them.

3. The circuit court of appeals was also clearly right in holding that petitioner had violated the regulation in discontinuing the 20% cash and carry discount. In view of the express provision in the regulation prohibiting changes in customary allowances and discounts extended in March, 1942, the court could not have reached any other conclusion. By no stretch of imagination can Section 4 (d) of the Act (Pet. p. 22) be said to authorize the discontinuance of the discount. That section merely provides that nothing in the Act shall be construed to require any person to sell a commodity or to offer any accommodations for

rent. It plainly has no bearing whatever on the case.

4. Petitioner not only flagrantly violated the regulation but vigorously defended its right to do in the future what it had done in the past. In these circumstances injunctive relief was clearly called for and the trial court erred in denying it. Cf. *Walling* v. *Helmerich & Payne, Inc.*, (No. 27, October Term, 1944, decided Nov. 6, 1944). The circuit court of appeals rightly directed that an injunction issue.

CONCLUSION

The decision is correct; there is no conflict, and no question of substance is presented. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

THOMAS I. EMERSON,
Deputy Administrator for Enforcement,
DAVID LONDON,
Chief, Appellate Branch,
Office of Price Administration.

DECEMBER 1944.